

## **Consumer Bankruptcy in Practice: A Webinar Series**

*Income, Expenses and Related Issues under BAPCPA*

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### **Introduction**

Courts have struggled to implement the complex and sometimes unclear provisions of BAPCPA. In particular, courts have not agreed on how to apply the complex provisions for dismissal of chapter 7 cases under §707(b), nor have they agreed on the meaning of §1325(b)'s requirement that all projected disposal income be paid into the chapter 13 plan for either three or five years.

A chapter 7 case may be dismissed under §707(b)(1) if it is an “abuse” of the provisions of chapter 7. Section 707(b)(2)(A) creates a presumption of abuse if the debtor’s “current monthly income” (defined in §101(10A)) is above the median and is sufficient—after deduction of monthly expenses, payments on secured debts, and expenses for payment of priority unsecured claims—to allow the debtor to pay \$10,950 on general unsecured claims over 60 months.<sup>1</sup> Section 707(b)(2)(B) provides the exclusive and very limited grounds for rebutting a presumption of abuse. If no presumption arises, or if the presumption is rebutted—that is, if the debtor has passed the “means test” or if the debtor is a below-median income debtor for whom the means test is inapplicable—then §707(b)(3) requires the court to consider two factors in determining whether the case still may be an abuse of chapter 7. The first factor is “[w]hether the debtor filed the petition in bad faith.” The second factor is whether “the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse.” Although §707(b)(1) provides that the court “may” dismiss the case if abuse is found, rather than that the court “must” dismiss the case, no court yet, as far as is known, has refused to dismiss a case after finding that the case is an abuse of the provisions of chapter 7.

Key issues on which courts disagree in determining whether there is a presumption of abuse under §707(b)(2) include (1) whether payments on a secured debt are deductible where the debtor has surrendered or plans to surrender the collateral, so that the payments will not in fact be made, and (2) whether the full amount for cost of ownership of a vehicle may be deducted where the debtor owns the vehicle free and clear. An additional important question that has arisen under §707(b)(2) is (3) whether unemployment insurance benefits are excluded from “current monthly income” as “benefits received under the Social Security Act;” thus far all the known court decisions have excluded such benefits, but some commentators argue that they should be included. Another key question on which courts disagree is (4) whether an above-median income chapter 7 debtor’s ability to make payments on debts can be a basis for dismissal under §707(b)(3), when there is no presumption of abuse under §707(b)(2).

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<sup>1</sup> The \$10,950 ability-to-pay threshold includes an inflation adjustment (effective April 1, 2007) to the \$10,000 figure originally included in §707(b)(2)(A)(i) under BAPCPA. Note that the text assumes that general unsecured claims in the case are at least four times the \$10,950 figure, or at least \$43,800. If general unsecured claims do not total that much, then the ability-to-pay threshold for abuse is lower than \$10,950; the threshold would be 25 percent of the amount of the general unsecured claims or \$6,575, whichever is greater.

Section 1325(b)(1) requires, if there is objection, that the chapter 13 plan either pay unsecured claims in full or else provide for payment to unsecured creditors of “all of the debtor’s projected disposable income to be received in the applicable commitment period.” The “applicable commitment period” is three years for a below-median income debtor and five years for an above-median income debtor. “Projected disposable income” is not defined in the statute, but “disposable income” is defined, and its definition uses—in two ways—the term “current monthly income,” which is defined in §101(10A). The definition of “current monthly income” in §101(10A) is backward looking; it is based on the six months preceding the bankruptcy filing. One key question on which courts have disagreed is (5) whether the word “projected” in the phrase “projected disposable income” indicates that “projected disposable income” is forward looking. If it appears that the debtor’s income will be substantially higher or lower during the plan than it was during the six months preceding the bankruptcy petition filing, what level of income will be used in determining projected disposable income? Another key question is (6) whether confirmation of an above-median income debtor’s plan may be denied on the basis of bad faith, due to failure of the plan to make sufficient payments to holders of general unsecured claims even if the plan provides for payment of all “projected disposable income” to such claim holders during the applicable commitment period.

**Issue 1: Whether future payments on secured debt are deductible from current monthly income under §707(b)(2) if the debtor has surrendered or plans to surrender the collateral, so that the payments will not in fact be made.**

Section 707(b)(2)(A)(i) provides that “the court shall presume that abuse exists if the debtor’s currently monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60” is at least equal to a figure that in most cases will be \$10,950. Section 707(b)(2)(A)(iii) provides:

The debtor’s average monthly payments on account of secured debts shall be calculated as the sum of—

- (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and
- (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor’s primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor’s dependents, that serves as collateral for secured debts; divided by 60.

Suppose the debtor had many months of payments yet to make on a secured debt (*e.g.*, for a second automobile) at the time the debtor filed a bankruptcy petition, but that the debtor has surrendered the collateral or plans to do so. Thus the debtor will not continue to make the monthly payments. Are the payments nevertheless included in the amount that the debtor may deduct under §707(b)(2)(A)(iii) because they are “scheduled as contractually due to secured creditors?”

Almost all the opinions in chapter 7 cases answer that question “yes.” Only three published opinions in chapter 7 cases were found that answer “no.” Several opinions in chapter 13 cases answer “no;” those opinions have been criticized by other chapter 13 opinions with respect to their generally methodology, but only one chapter 13 opinion was located (an unpublished opinion) that answers this precise question with a “yes.” Note that §707(b)(2)(A) applies in chapter 13 cases because it is incorporated into §1325(b)(3) for purposes of

determining an above-median income debtor’s reasonable expenses. Several of the chapter 13 opinions that answer “no” go on to state that the result might be different if the case were in chapter 7 because the language of chapter 13 is forward looking. Note also that §1325(b)(3) looks to §707(b)(2)(A)-(B) for “[a]mounts reasonably necessary to be expended,” but that §707(b)(2)(A)(iii) does not by its terms provide an expense amount, but rather simply an average monthly payment amount. No opinion has been found in which a court determined that §707(b)(2)(A)(iii) therefore simply is not applicable in the §1325(b)(3) analysis, but such an argument could be made.

Here is a sampling of the many majority rule cases and a listing of the minority cases, including the opinions in chapter 13 cases. The author believes the list includes all published minority rule cases as of the date of writing. Note that *Singletary*, listed in both columns, takes a middle ground.

<b><u>Included in “average monthly payments on account of secured debts” and thus deductible</u></b>	<b><u>Excluded from “average monthly payments on account of secured debts” and thus not deductible</u></b>
<p><b><u>Chapter 7 cases:</u></b></p> <p><i>Fokkena v. Hartwick</i>, __ B.R. __, 2007 WL 2350560 (D. Minn. Aug. 20, 2007), <i>aff’g in relevant part In re Hartwick</i>, 352 B.R. 867 (Bankr. D. Minn. 2006).</p> <p><i>In re Randle</i>, 2007 WL 2668727 (N.D. Ill. July 20, 2007), <i>aff’g In re Randle</i>, 358 B.R. 360 (Bankr. N.D. Ill. 2006).</p> <p><i>In re McDaniel</i>, No. 06-62786 (Bankr. N.D. Ga. Aug. 24, 2007) (available at <a href="http://www.ganb.uscourts.gov/judges/opn/opn_vie.php?Id=901">http://www.ganb.uscourts.gov/judges/opn/opn_vie.php?Id=901</a>).</p> <p><i>In re Walker</i>, 2006 WL 1314125 (Bankr. N.D. Ga. May 01, 2006).</p> <p><i>In re Hayes</i>, __ B.R. __, 2007 WL 2815983 (Bankr. D. Mass. Sept. 26, 2007).</p> <p><i>In re Maya</i>, __ B.R. __, 2007 WL 2433929 (Bankr. S.D. Cal. Aug. 14, 2007).</p> <p><i>In re Palm</i>, 2007 WL 1772174 (Bankr. D. Kan. June 19, 2007).</p> <p><i>In re Vartan</i>, 2007 WL 640006 (Bankr. E.D. Cal. Feb. 26, 2007).</p> <p><i>In re Wilkins</i>, 370 B.R. 815 (Bankr. C.D. Cal. 2007).</p>	<p><b><u>Chapter 7 cases:</u></b></p> <p><i>In re Ray</i>, 362 B.R. 680 (Bankr. D.S.C. 2007).</p> <p><i>In re Harris</i>, 353 B.R. 304 (Bankr. E.D. Okla. 2006).</p> <p><i>In re Skaggs</i>, 349 B.R. 594 (Bankr. E.D. Mo. 2006).</p> <p><i>In re Singletary</i>, 354 B.R. 455 (Bankr. S.D. Tex. 2006) (holding that payments are deductible where the collateral has not yet been surrendered at the time of the hearing, but are not deductible where the collateral has been surrendered as of the time of the hearing).</p> <p><b><u>Chapter 13 cases:</u></b></p> <p><i>In re Edmonson</i>, 371 B.R. 482 (Bankr. D.N.M. 2007).</p> <p><i>In re Love</i>, 350 B.R. 611 (Bankr. N.D. Ala. 2006).</p> <p><i>In re McGillis</i>, 370 B.R. 720 (Bankr. W.D. Mich. 2007).</p> <p><i>In re Crittenden</i>, 2006 WL 2547102 (Bankr. M.D. N.C. 2006).</p> <p><i>In re Edmunds</i>, 350 B.R. 636 (Bankr. D.S.C. 2006).</p>

*In re Kogler*, 368 B.R. 785 (Bankr. W.D. Wis. March 30, 2007).

*In re Galyon*, 366 B.R. 164 (Bankr. W.D. Okla. 2007).

*In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007).

*In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006) .

*In re Simmons*, 357 B.R. 480 (Bankr. N.D. Ohio 2006).

*In re Singletary*, 354 B.R. 455 (Bankr. S.D. Tex. 2006) (holding that payments are deductible where the collateral has not yet been surrendered at the time of the hearing, but are not deductible where the collateral has been surrendered as of the time of the hearing).

**Chapter 13 case answering specific question “no”:**

*In re Oliver*, 2006 WL 2086691 (Bankr. D. Or. June 29, 2006).

**Chapter 13 cases critical of general approach of chapter 13 cases that answer specific question “yes”:**

*In re Winokur*, 364 B.R. 204 (Bankr. E.D. Va. 2007) (criticizing approach under which actual projected disposable income is used rather than projected disposable income based on statutory formula, and criticizing general approach of *Edmunds* on that ground).

*In re Hanks*, 362 B.R. 494 (Bankr. D. Utah 2007) (same).

**Issue 2: Whether the full IRS expense allowance for ownership of a motor vehicle can be taken under §707(b)(2)(A)(ii) where the debtor owns the vehicle free and clear.**

Under §707(b)(2)(A)(ii)(I), the means test applicable to an above-median income chapter 7 debtor allows the debtor to take account of expenses in amounts equal to the “applicable monthly expense amounts specified under the National Standards and Local Standards...issued by the Internal Revenue Service.” The section also makes clear that any such expenses “shall not

include any payments for debts.” (Scheduled payments on secured debts are handled separately under §707(b)(2)(A)(iii).) The IRS standards for expenses of vehicle ownership (separate from costs of vehicle operation) assume that the debtor does not own the motor vehicle free and clear, and thus the amounts under the standards include an allowance for what the IRS considers to be an appropriate monthly payment on a vehicle. Line 23 of Official Form B22A (Statement of Current Monthly Income and Means Test Calculation for Use in Chapter 7) calculates the debtor’s cost of ownership of a vehicle, net of debt payments, by subtracting the debtor’s average monthly car payment from the amount of the IRS ownership cost allowance; the resulting figure (but not less than zero), is entered on line 23. When the debtor’s car payments then are deducted pursuant to §707(b)(2)(A)(iii), the debtor will end up with a total allowance for ownership of the vehicle at least equal to the total IRS allowance. If the debtor’s car payment is more than the entire IRS allowance, the debtor’s total allowance will equal that payment amount.

What should a court do, however, if the debtor owns the automobile free and clear? The IRS ownership expense allowance assumes that the debtor has a payment to make; the calculation on Form B22A will allow the debtor the entire IRS standard amount even though the debtor has no such payment to make. Some courts have allowed the debtor to take the entire allowance; others have not, which is consistent with the IRS manual’s requirements of its agents who are trying to collect taxes. The manual is not explicitly incorporated into §707(b)(2)(A)(ii), but some courts look to the word “applicable” in §707(b)(2)(A)(ii) to justify elimination of the portion of the standard amount that, on the view of such courts, simply is not applicable to a debtor who has no car payment. (Note, however, that most automobiles owned free and clear will be somewhat old, and the IRS standards permit an extra \$200 operating expense allowance for car repairs on older cars (six years or 75,000 miles). See *In re Howell*, 366 B.R. 153, 156 (Bankr. D. Kan. 2007).)

Because of the incorporation by reference of §707(b)(2)(A)-(B) in the disposable income test of §1325(b)(3), this issue can arise both in chapter 7 and in chapter 13 (with respect to Official Form B22C, line 28).

Here is a sample of the cases on both sides of the issue:

<b><u>Debtor is entitled to entire IRS allowance for cost of ownership even though debtor owns vehicle free and clear</u></b>	<b><u>Debtor is not entitled to entire IRS allowance where debtor owns vehicle free and clear</u></b>
<p><b><u>Chapter 7 cases:</u></b></p> <p><i>Fokkena v. Hartwick</i>, ___ B.R. ___, 2007 WL 2350560 (D. Minn. Aug. 20, 2007), <i>rev’g in relevant part In re Hartwick</i>, 352 B.R. 867 (Bankr. D. Minn. 2006).</p> <p><i>In re Scarafiotti</i>, ___ B.R. ___, 2007 WL 2745700 (Bankr. D. Colo. 2007) (collecting cases).</p> <p><i>In re Vesper</i>, 371 B.R. 426 (Bankr. D. Alaska 2006).</p> <p><b><u>Chapter 13 cases:</u></b></p> <p><i>In re Moorman</i>, ___ B.R. ___, 2007 WL</p>	<p><b><u>Chapter 7 cases:</u></b></p> <p><i>In re McDaniel</i>, No. 06-62786 (Bankr. N.D. Ga. Aug. 24, 2007) (available at <a href="http://www.ganb.uscourts.gov/judges/opn/opn_view.php?Id=901">http://www.ganb.uscourts.gov/judges/opn/opn_view.php?Id=901</a>).</p> <p><i>In re Talmadge</i>, 371 B.R. 96 (Bankr. M.D. Pa. 2007) (collecting cases and determining that 20 opinions had allowed full IRS allowance but that 14 (or 15 after its own opinion) had not).</p> <p><i>In re Harris</i>, 353 B.R. 304 (Bankr. E.D. Okla. 2006).</p> <p><b><u>Chapter 13 cases:</u></b></p>

2822917 (Bankr. C.D. Ill. Sept. 28, 2007).	<i>In re Howell</i> , 366 B.R. 153 (Bankr. D. Kan. 2007).
<i>In re Wilson</i> , 373 B.R. 638 (Bankr. W.D. Ark. 2007).	<i>In re Hardacre</i> , 338 B.R. 718 (Bankr. N.D. Tex. 2006).
<i>In re Watson</i> , 366 B.R. 523 (Bankr. D. Md. 2007).	<i>In re Slusher</i> , 359 B.R. 290 (Bankr. D. Nev. 2007).
<i>In re Grunert</i> , 353 B.R. 591 (Bankr. E.D. Wis. 2006).	<i>In re McGuire</i> , 342 B.R. 608 (Bankr. W.D. Mo. 2006).

**Issue 3: Whether “current monthly income” as defined in §101(10A) includes unemployment insurance benefits received by the debtor, or whether such benefits are excluded from “current monthly income” as “benefits received under the Social Security Act.”**

Many debtors will file bankruptcy petitions due to financial distress caused by loss of employment. Thus many debtors will have received unemployment insurance benefits during the six months prior to filing a petition, which is the period to which we look in calculating “current monthly income” under §101(10A). Calculation of current monthly income is foundational to determining whether the means test applies in a chapter 7 case, to determining whether the chapter 7 debtor passes the means test so that no presumption of abuse arises, and to determining, in chapter 13, the amount of the debtor’s projected disposable income that must be paid under the plan to holders of general unsecured claims. Thus whether unemployment insurance benefits are included in or excluded from current monthly income is an important issue.

Two bankruptcy court opinions take the position that unemployment insurance benefits are “benefits received under the Social Security Act” within the meaning of that phrase in §101(10A), and thus are excluded from any calculation of current monthly income. *See In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007); *In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007). The official forms do not take a firm position on this issue; they ask debtors to include unemployment insurance benefits in the calculation of current monthly income but allow debtors to decline to do so, and to state the amount of unemployment insurance benefits separately, if they contend that such benefits should not be included in calculation of current monthly income. *See Official Forms B22A*, line 9, and *B22C*, line 8. Prof. David Gray Carlson’s comment on *Sorrell* is illuminating, though perhaps it does not do justice to Judge Waldron’s extended analysis:

Unemployment compensation is a state-provided benefit. Yet, under the Social Security Act, grants are provided to the states if states choose to offer unemployment benefits, provided the state complies with federal mandates. Do the indirect subsidies authorized by the Social Security Act make state unemployment benefits excludible under the definition of “current monthly income”? Judge Thomas Waldron, in *In re Sorrell*, found these benefits excludible. His major point is a “knew how to” argument. In several sections of BAPCPA, Congress knew how to invoke limited portions of the Social Security Act. But in defining “current monthly income,” §101(10A) excludes “benefits received under the Social Security Act.” Congress must have

intended, Judge Waldron concluded, that *indirect* benefits stemming from the Social Security Act were not to be included as currently monthly income under §101(10A).

David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 262-63 (2007) (footnotes omitted).

Consumer bankruptcy lawyer and author Henry J. Sommer takes the position that unemployment insurance benefits are excluded as “benefits received under the Social Security Act.” See Henry J. Sommer, “Trying To Make Sense out of Nonsense: Representing Consumers Under the ‘Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,’” 79 Am. Bankr. L.J. 191, 194-95 (2005); 2 *COLLIER ON BANKRUPTCY* (Alan N. Resnick & Henry. J. Sommer eds., 15th ed. rev.) ¶ 101.10A (2007). As Judge Rosenthal pointed out in *Munger*, however:

Commentators disagree whether unemployment compensation is included in CMI. For example, Judge Wedoff argues that, to categorize unemployment compensation as a “benefit under the Social Security Act” would be a “strained interpretation...since unemployed individuals receive no benefits ‘under the Social Security Act,’ but only under the programs adopted by their states, which may provide benefits beyond those that are federally funded.” Eugene R. Wedoff, *Means Testing in the New §707(B)*, 79 AM. BANKR. L.J. 231, 247 (Spring 2005). Moreover, he contends that interpreting the language in the entirety of §101(10A) provides more support for his view. He argues that the distinction in §101(10A) between “income from all sources” and “taxable income” should be interpreted similarly to the distinction between “gross income” and “taxable income” in the tax code. Under the tax code, unemployment compensation is included in gross income. According to Judge Wedoff’s analysis, unemployment compensation would be included in the calculation of CMI. See also Marianne Culhane & Michaela White, *Catching Can-Pay Debtors—Is the Means Test the Only Way?* 13 AM. BANKR. INST. L. REV. 665, 674 (Winter 2005) (suggesting that the presumed purpose for exclusion of benefits received under the Social Security Act was specifically “to protect retirement benefits at the expense of creditors”).... Another commentator argues that the Supremacy Clause supports excluding unemployment compensation from CMI. As noted in an American Bankruptcy Institute article [*sic*], “regardless of whether a State may contribute to the Unemployment Trust Fund, Federal law governs, supporting the position that unemployment compensation is ultimately a benefit received under the Social Security Act.” Allard, David W. et al., *Means Test—Can it Work?*, American Bankruptcy Institute, 13th Annual Central States Bankruptcy Workshop (2006).

*In re Munger*, 370 B.R. 21, 24-25 (Bankr. D. Mass. 2007) (footnotes omitted).

**Issue 4: Whether an above-median income chapter 7 debtor’s ability to make payments on debts can be a basis for dismissal under §707(b)(3), when there is no presumption of abuse under §707(b)(2).**

If a presumption of abuse does not arise under §707(b)(2)(A), or if a presumption of abuse does arise but is rebutted under §707(b)(2)(B), then the court is directed by §707(b)(3) to consider two factors in determining whether the chapter 7 case still might be an abuse of chapter 7’s provisions. First, the court is to consider whether the chapter 7 case was filed in bad faith. Section 707(b)(3)(A). Second, the court is to consider whether “the totality of the circumstances...of the debtor’s financial situation demonstrates abuse.” Section 707(b)(3)(B).

Courts routinely state that the debtor’s ability to pay debts is relevant to whether a case is an abuse under §707(b)(3). See, e.g., *In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006). Courts typically note (a) that ability to pay is part of the “totality of the circumstances” that may show abuse, see, e.g., *id.*, (b) that the §707(b)(2) means test is not the exclusive basis for consideration

of ability to pay under §707(b), *see, e.g., id.*, and (c) that post-petition events (such as increases in income) may be considered as part of the “totality of the circumstances,” *see, e.g., In re Henebury*, 361 B.R. 595 (Bankr. S.D. Fla. 2007). The focus of the courts, with respect to ability to pay, has been on the debtor’s ability to pay such debts *in a chapter 13 case*, *see, e.g., id.* at 611 (“In determining if the granting of relief would be an abuse of the provisions of chapter 7, courts are required to determine if the debtor has the ability to pay a substantial portion of their unsecured claims through a chapter 13 plan based upon the totality of the debtor’s financial circumstances”). *But see In re Johns*, 342 B.R. 626 (Bankr. E.D. Okla. 2006), wherein the court agreed with the U.S. Trustee that potential inability to pay in a chapter 13 was not a special circumstance.

The real question often may be the amount of such debts that the debtor would be able to pay *and required to pay* in chapter 13. If the debtor is forced to use chapter 13 to obtain bankruptcy relief (perhaps by way of conversion of the case to chapter 13 with the debtor’s consent), but would not be required to make substantial payments to holders of general unsecured claims in the chapter 13 case, it might seem that there is little point in dismissing the chapter 7 case. *But see In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007) (not deciding whether debtors would be required to make substantial payments in a chapter 13 case but dismissing their chapter 7 case under §707(b)(3) because “[i]f they do choose to seek relief under chapter 13, they certainly have the ability, even if not required to do so under §1325(b), to apply their actual excess income to plan payments for the benefit of their unsecured creditors”).

The amount the debtor would be required to pay in a chapter 13 case, in turn, depends on the approach the court takes to issues 1 and 2 above and to issues 5 and 6 below. In a chapter 13 case, a debtor’s plan must either pay holders of general unsecured claims in full or else pay holders of such claims all the debtor’s “projected disposable income” for the applicable commitment period (3 years or 5 years). If the court uses a mechanical, nonforward-looking approach to determining “projected disposable income” under §§1325(b)(1)(B) and 1325(b)(2) (which incorporates, at least to a substantial degree, the means test of §707(b)(2)), then a debtor who passes the means test would have little or no projected disposable income, and thus might not be required to pay any substantial amount to holders of general unsecured claims in a chapter 13 case. If so, then, as a practical matter, the above-median income chapter 7 debtor who passes the means test probably would not be likely to have the case dismissed under §707(b)(3) because of ability to pay nonpriority unsecured debts in a chapter 13 case, even if the debtor has the actual ability to make substantial payments on such debts in a chapter 13 case.

Note that some courts take a forward-looking approach to determining projected disposable income. *See* discussion of issue 5 below. Some courts that use a nonforward-looking approach nevertheless consider actual ability to pay in determining whether the chapter 13 case was filed in good faith (or whether the chapter 13 plan was proposed in good faith). *See* discussion of issue 6 below. Similarly, some courts may permit debtors to take into account certain expenses or payments for purposes of the §707(b)(2) means test but not for purposes of §1325(b)(2). *See* discussion of issues 1 and 2 above. Under any of these three approaches, the courts could require an above-median income debtor who passed the §707(b)(2) nevertheless to make substantial payments on general unsecured claims in a chapter 13 case. Such courts then might well dismiss an above-median income chapter 7 debtor’s case under §707(b)(3) because of ability to make substantial debt payments *that would be required* in a chapter 13 case, even though the debtor passes the §707(b)(2) means test.

As a result, the resolution of this issue—issue 4—may depend largely on the resolution of the other issues.

**Issue 5: Whether the “projected disposable income” of an above-median income debtor that must be paid to holders of general unsecured claims under §1325(b)(1)(B) is determined by taking into account the actual post-petition disposable income that the debtor is likely to have, or whether it is determined mechanically by multiplying “disposable income” as calculated under §1325(b)(2)-(3) by the number of months in the applicable commitment period.**

Courts have taken two approaches to determination of “projected disposable income” for purposes of §1325(b)(1)(B). Some courts have taken “disposable income,” as determined under §1325(b)(2) using the incorporated provisions of §707(b)(2)-(3), applied as of the petition date, and then “projected” it over the three- or five-year commitment period by simply treating it as applicable to each month of the three or five-year period. Other courts have held that the word “projected” requires a forward-looking approach, with disposable income as determined under §1325(b)(2) acting only as a starting point subject to adjustment where it can be anticipated that actual future income in excess of reasonable expenses will be different. As one bankruptcy court recently explained:

Bankruptcy courts are closely split as to the proper means for calculating projected disposable income of an above-median-income debtor. A growing minority of cases holds the amount computed on Form B22C is determinative. *In re Miller*, 361 B.R. 224 (Bankr. N.D. Ala. 2007); *In re Brady*, [361 B.R. 765] No. 06-18922, 2007 WL 549359 (Bankr. D.N.J. Feb. 13, 2007); *In re Kolb*, [366 B.R. 802] No. 06-32036, 2007 WL 960135 (Bankr. S.D. Ohio March 30, 2007); *In re Naslund*, 359 B.R. 781 (Bankr. D. Mont. 2006); *In re Barr*, 341 B.R. 181 (Bankr. M.D.N.C. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); *In re Farrar-Johnson*, 353 B.R. 224 (Bankr. N.D. Ill. 2006) (only considering the relevance of Schedule J). The majority holds the court may consider Schedules I and J, although the cases offer varying opinions about the amount of weight given to the schedules. *In re Grant*, [364 B.R. 656] No. 06-32299, 2007 WL 858805 (Bankr. E.D. Tenn. March 19, 2007); *In re LaPlana*, [363 B.R. 259] No. 6:05 BK 17635, 2007 WL 431627 (Bankr. M.D. Fla. Feb. 9, 2007); *In re Clemons*, No. 05-85163, 2006 Bankr.Lexis 1366 (Bankr. N.D. Ga. June 1, 2006); *In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga. 2006); *In re Watson*, [366 B.R. 523] No. 06-11948, 2007 WL 1086582 (Bankr. D. Md. April 11, 2007).

*In re Berger*, 2007 WL 1704403 at \*2 (Bankr. M.D. Ga. June 11, 2007) (stating that “the plain language of §1325(b) requires an above-median-income debtor's projected disposable income to be determined in accordance with current monthly income minus expenses set forth in the means test in §707(b). In other words, Debtors are not obligated to pay more than the disposable income calculated on Form B22C. This applies regardless of any known changes in Debtors' expenses, such as satisfaction of their two 401(k) loans.” (footnote omitted)).

For a recent opinion adopting the future-looking approach, at least with regard to income to be received by the debtors (one of whom, the debtor-husband, was unemployed during the six months prior to the filing), see *In re Mancl*, \_\_\_ B.R. \_\_\_, 2007 WL 2695240 (Bankr. W.D. Wis. Aug. 24, 2007). For an opinion holding that income may not be determined on a forward-looking basis but that expenses may be (and holding in particular that expenses for payments on secured debt are not allowable where the payments will not be made in the chapter 13 case), see *In re McGillis*, 370 B.R. 720 (Bankr. W.D. Mich. 2007).

**Issue 6: Whether confirmation of an above-median income debtor’s chapter 13 plan may be denied for lack of good faith, due to failure of the plan to make sufficient payments to holders of general unsecured claims even if the plan provides for payment of all “projected disposable income” to such claim holders during the applicable commitment period.**

Section 1325(a)(3) conditions confirmation of a chapter 13 plan on the debtor’s good faith in proposing the plan. Section 1325(a)(7), added by BAPCPA, conditions confirmation on the debtor’s good faith in filing the bankruptcy petition. The issue here is whether either of those provisions may require the debtor to pay more on general unsecured claims than is required under the projected disposable income requirement of §1325(b)(1)(B), particularly when the debtor is an above-median income debtor who actually is able to pay a substantially larger amount than the amount determined as projected disposable income under the nonforward-looking mechanical approach. This issue is of practical importance when the court refuses to take a forward-looking approach to determination of projected disposable income.

Some courts that refuse to take a forward-looking approach to determination of projected disposable income under section will nonetheless consider the debtor’s actual ability to make chapter 13 payments in determining whether to deny confirmation of the plan on the basis of bad faith. Others take the view that if the debtor is paying all projected disposable income into the plan for payment to holders of general unsecured claims, then there is no further role for consideration of whether the debtor’s payments are sufficiently high. The following chart provides some of the opinions on each side of the issue.

<b><u>No Role for Consideration of Amount of Plan Payments on General Unsecured Claims in Determining Good Faith Where All Projected Disposable Income Is Devoted To Paying Them</u></b>	<b><u>Confirmation of Ch. 13 Plan May Be Denied for Lack of Good Faith Due to Insufficient Payments on General Unsecured Claims Even If All Projected Disposable Income Is Devoted To Paying Them</u></b>
<i>In re Winokur</i> , 364 B.R. 204 (Bankr. E.D. Va. 2007).	<i>In re McGillis</i> , 370 B.R. 720 (Bankr. W.D. Mich. 2007).
<i>In re Farrar-Johnson</i> , 353 B.R. 224 (Bankr. N.D. Ill. 2006).	<i>In re Devilliers</i> , 358 B.R. 849 (Bankr. E.D. La. 2007).
<i>In re Alexander</i> , 344 B.R. 742 (Bankr. E.D.N.C. 2006).	<i>In re Edmunds</i> , 350 B.R. 636 (Bankr. D.S.C. 2006).
<i>In re Barr</i> , 341 B.R. 181 (Bankr. M.D.N.C. 2006).	